

UNVEILING THE POLITICS OF TRIPLE TALAQ: NECESSITY OR OPPORTUNISM

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Abstract: The question of instant Triple divorce among Muslims in India is one of the most intriguingly controversial issues. The recent judgment of the honourable Supreme Court and the proposed bill by the Government on Triple divorce has created a debate among legal luminaries, social activists and academicians in India. There are recorded instances, where clearly Muslim women in India have been subjected to Talaq-ul-bida or instant triple divorce, which most of the jurists of Islamic law have considered sinful and clearly an innovation. This phenomenon has been widely prevalent among Indian Muslims. The paper examines the issue through the theological, legal and political perspective. This paper also focuses on the procedure of divorce in India and its Politicisation at the hands of certain elements for political gain. It would also discuss the implications of the bill and its ramification.

Keywords: 1) Triple Talaq, 2) Muslim Women, 3) Sharia, 4) Triple Talaq Bill, 5) Politicisation.

INTRODUCTION

Religion has been the source of legal doctrines ever since the dawn of human civilization. Islam, like most of religions offered a certain code for maintenance of human relations. The aspect of law concerning with civil and criminal aspects has been termed as 'Sharia'. Sharia law or Islamic law around the world and particularly in India has been at the core of the various controversies. There has been a notion that women have been oppressed in Islam because of Sharia. Those arguing for this view take practices like polygamy and unilateral divorce for men. The unfortunate part has been the reality that Islamic Law being misunderstood. This enigma could be best observed in the context of Muslim women and the failure on part of Muslim community or respective state's to appreciate their rights. Contrary to popular belief that "the deterioration of women's rights in many Islamic countries" and amongst Muslim communities has not been derived from the Islamic teachings or Islamic nature, but rather can be attributed to gender inequalities resulting from a cultural mind-set that preserves male-dominated practices over women. (Mohammad, 2014) Even those commentators, who generously recognize the virtues of Islam, enunciate the notion that Islam has relegated women to an inferior status. The subject of Muslim women or women in Islam continues to provoke debate, appeal, pity, anger and grief.

In recent years, there has been heated controversy on the issue of Muslim practice of instant triple divorce. Although this practice has been banned in many Muslim countries including Pakistan, Turkey and Bangladesh but in India it is still practiced and there have been many cases of triple divorce. The debate around the Triple Divorce started with the landmark case of Shah Bano (1985) in which the Supreme Court initially granted divorce and maintenance to Bano for life. (Mohd. Ahmed Khan v. Shah Bano Begum, 1985) However, the Judgement was overturned due to the protest by the Muslim leaders stating that the court can't interfere in personal law. The Indian Parliament reversed the judgement due to the criticism from Muslim community. Therefore, Muslim Women (Protection of Rights on Divorce Act 1986) was enacted in which it was said that the maintenance can only be made liable for the iddat period only. (The Muslim Women (Protection of Rights on Divorce) Act 1986, 2017) Since then this issue has been discussed in several cases. But this came into public eye when Sharaya Banu, Bharatiya Muslim Mahila Andolan (BMMA) and other organisations filed petitions in the Supreme Court demanding ban on triple divorce as they have suffered due to practice of Unilateral Divorce. The government also supported the triple Divorce ban and submitted an affidavit in which it was held that gender equality is non- negotiable and religious identity can't be the reason to deny Muslim women equality, Justice and dignity. The Supreme Court banned the practice of Instant triple divorce and declared it unconstitutional. The government proposed a bill (Protection of Rights on Marriage Bill, 2017) against Triple divorce and made it an offence with three year imprisonment and a fine and attempted to convert civil wrong into criminal act. The practice has been struck down because it is manifestly arbitrary. But the bill is opposed by many including All India Muslim Law Personal Board (AIMPLB). There is a need to be clear about the rationale for any change that may be contemplated and those who favoured the decision have embedded their position in terms of the concept of Gender Justice as enunciated in modern democratic and liberal theories. There is a problem within all traditions and religious or cultural communities, opinions are divided between those who would want to adhere to relatively conservative interpretations and those who would want to explore the possibilities for more broad-based interpretations to advance the general good. (Ahmed, 2001) Under the Islamic conception of gender Justice, men and women are not seen as equal nor are they actually conceded absolutely equal rights and privileges (as in the liberal – democratic tradition), but importance is placed upon treating women with consideration and ensuring justice to them. (Ahmed, 2001) The problem clearly exhibits the importance of the issue and the need to discourse it.

ISLAMIC UNDERSTANDING OF DIVORCE

Sharia (Islamic law) is the basis of its concept of rights and duties. The word Sharia is derived from the Arabic word sari'a which means "the path which has been prepared, the divinely appointed path." Sharia law is based on several sources including:

the Quran, *Sunna* of the Prophet Muhammad (Peace Be Upon Him), *Ijma* (consensus), *Qiyas* (application by analogy), and *Ijtihad* (“deducing legal norms from the secondary sources of *Qiyas* and *Ijma*”). The first two sources of Sharia—the Quran and *Sunna* of the Prophet—are considered divine; whereas, the other three sources—*Ijma*, *Qiyas*, and *Ijtihad*—are man-made. The Quran and *sunnah* were given shape and direction by Islamic Scholars during the second and third centuries of the Muslim calendar. These Scholars developed and applied *Ijma*, *Qiyas* and *Ijtihad* to make their interpretation and ruling on Islamic law. The four Schools of Sunni thought are named after the four Jurists who codified Sharia law: Abu Hanifa, Malik ibn Anas, Muhammad Ibn Idris al-Shafi and Ahmed Hanbal. Among the Shias, there are three Schools of thought: Jafari, Zaidi and Ismaili School. (Mohammad, 2014)

In Islam, marriage is both a civil contract entered into by mutual consent of the bride and groom, and a highly sacred bond to which great religious and social importance is attached. (Khan, 2006). In Islam dissolution of marriage is permitted where spouse legitimately feel that they cannot live together for whatever reason but great emphasis has been laid on its being concession and a measure to be resorted to only where there is no alternative. Therefore, the prophet Muhammad has said “of all things permitted, divorce is the most hateful in the sight of God. (Khan, 2006) Tahir Mahmood has said that Islamic law stands for what is known as the breakdown Theory of Divorce. (Tahir Mahmood, Saif Mahmood, 2012). The Quran originally gave man the right to divorce; its verses emphasize the importance to be just, to fear God in any decision, and to . . . ‘(do so) on equitable terms or separate with kindness.’ Islam gives women the right to divorce on several grounds if the relationship between the spouses becomes unbearable and impossible. Islam [overly] encourages reconciliation rather than severance of their marriage. But both the Quran and the *Sunna* present negative attitudes towards divorce. (Mohammad, 2014). Under Islamic Law only under extreme situations the matter has to be referred to the courts and required people to act quietly and privately. Equality is advocated between husband and wife in the marital relationship throughout the *Quran* and Islamic teachings. The development of *Sharia* principals were “influenced by the prevailing social, economic, and political conditions which granted significant advantages to husbands over wives in the process of divorce. Under the interpretations of the four jurists, men enjoyed overwhelming power over their wives through the control of setting and declaring the divorce; women had no control or ability to consult once their husband declared himself divorced. Men had almost unlimited powers to divorce their wives. (Mohammad, 2014) There are three types of divorce under Islamic law: 1) Talaq-e-Ahsan (most approved), 2) Talaq-e-Hasan (good), and 3) Talaq al bid’a (innovation). Talaq-e-Ahsan and Talaq-e-Hasan describe the conduct of the man in pronouncing a divorce in compliance with law. In Talaq-e-Ahsan, a man pronounces divorce after efforts to reconcile has failed and the wife is in the state of purity. But he must try to revoke it, by words or conduct within the permissible period of three months which is known as waiting period (*iddat*). If he failed to do so within the said period, the parties are formally divorced. The good thing about this type of divorce is that the parties can remarry by mutual consent and new marriage contract and dowry would be required. While in Talaq-e-Hasan, the Quran clearly proclaims “Divorce no more than twice” which means that revocable divorce can be pronounced only twice in life. so if a man pronounces a divorce and revokes it but find it difficult to pull on with his wife divorces her once again, he will have one more chance to revoke it or remarry her after *iddat* with her consent. But, if ever in life the husband pronounces divorce for third time that will be the end of marriage with no possibility for revocation or remarriage. (Tahir Mahmood, Saif Mahmood, 2012) In addition, the couple cannot remarry each other unless the wife has married another man in the interim and divorces him and becomes a widow. The reason for this has been stated by the Prophet Muhammad *s.a.w* that “she must taste the sweetness of another before she could be lawful again to first husband. (Mohammad, 2014) The third type Talaq al bid’aa, where the husband simply pronounces three divorces at once i.e. I divorce you, I divorce you, and I divorce you while his wife is between her menstrual cycles. According to traditional interpreters of *sunni* law, Talaq al bid’aa is sinful but effective. It has the legal effect of a third time divorce and hence instantly dissolves the marriage. However there is controversy, whether three divorces could be pronounced in one sitting or such pronouncements could occur on three different occasions. This is practiced among the *sunni* Muslims and has legal validity. The two schools Hanafi and Maliki maintains that three divorces in one sitting is bid’ah and this form of divorce is not permissible but would be valid and would result in Talaq-i-battah (irrevocable divorce). However, shaafi School upholds that it is permissible and it is husbands right. Therefore among the four schools, only Hanbali School considers that it is against the Quran and *sunnah*, and three divorces pronounced at one sitting would be treated as one. Talaq al bid’aa was introduced during the Caliph Umar-ibn al- Khattab to discourage haste in divorce due to the prevailing conditions at that time and he had the power to fully compensate any women affected by the ruling and it was considered a mere administrative decision for particular period of time. (Tabasum, 2013)

LEGAL ASPECT IN CONTEXT OF INDIA

The Muslim Personal Law in India was codified during the British rule, two legislations – Shariat Act 1937 and the dissolution of Muslim Marriage Act 1939 were passed. The purpose of these acts was to apply Muslim Personal Law to Muslim men and women who were governed by customary laws. These were progressive steps to provide rights to Muslim women which were denied to them under customary laws. Under the Shariat Act, laws related to inheritance, divorce, marriage and guardianship of Indian Muslims were brought under shariat laws. (Gangoli, 2001) Therefore, Muslim Personal Law in India is not entirely Islamic law. It consists of three parts – opinions of Muslim jurists (which are not codified), decisions given by British and Indian judges, most of whom were non-Muslim. Third, it includes these laws, the Shariat Act, 1937; Dissolution of Muslim Marriage Act, 1939; Muslim Women (Protection of Rights on Divorce) Act, 1986; Waqf Acts, etc. (Mustafa, 2017). It is not a uniform body of legal rules. There are two broad forms of non-Statutory Law in the country i.e. Sunni Law and Shia law. These are the laws of the Sunni Hanafi and Shia Ithna Ashari Jafri Schools of Muslim Law. In India, Muslim Law is applied as a part of country’s civil law, and not as a part of the Muslim religion. It does not enjoy any special status so as to be protected by the religious-liberty provisions of the Indian Constitution and it is within the legislative competence of the state for the purpose of amendment and reform and also within the courts’ power of ascertainment, interpretation and application of law. (Tahir Mahmood, Saif Mahmood, 2012) My paper deals with divorce and in particular Triple divorce.

In India, many Muslim men follow the procedure of Talq-ul-Bidat to divorce their wives. They are unaware of the true Islamic law on divorce. An eminent Scholar of Islam Abul Ala Maudidi has said “due to ignorance Muslims generally believe that divorce can be given only through Triple divorce formula, although it is a sin and leading to terrible consequences.” Judicial decisions of the past in India on the Muslim Law of divorce by husband have been based mainly on the concept of Talaq-ul Bidat which they have enforced unmindfully without regard to its devastating effects on Muslim society in this country. (Tahir Mahmood, Saif Mahmood, 2012) As per the 2011, census, only 0.49% Muslim women were divorcees but all them were not given triple divorce. In 2015, Bharatiya Muslim Mahila Andolan (BMMA) conducted a case study in states of Rajasthan, Madhya Pradesh, Maharashtra, Tamil Nadu, Karnataka, Uttar Pradesh, Orissa, and West Bengal to investigate into the cases of Triple Divorce among Muslims. According to their report, 59% of the women were divorced unilaterally by their husbands by mere utterance of the word Talaq thrice. In almost all the other cases as well, the divorce was one sided, with either the women being informed of her divorce by the local Qazi, relatives or by husband on phone and only 1% was divorced by SMS. (zakia soman, Dr noorjehan safia niaz, 2015) (Tabasum, 2013) In this regard a petition was filled by Muslim women to abolish this practice of Triple Divorce. Therefore, the supreme court of India in *Shayara Banu v. U.O.I. and others* (Shayara Bano vs Union Of India, 2017) delivered a land mark Judgement with regard to Triple divorce under Muslim Personal Law. As per majority, the Honourable Supreme Court upheld that practice of Talaq-e-Bidat or Triple Talaq (i.e instant, irrevocable, unilateral divorce by husband by formula of pronouncing divorce three times) is not protected by Article 25 of the Constitution as it is not essential religious practice. The court further held that Triple divorce is against the basic tenants of Quran, and thus violates the Sharia. Even though Triple Talaq is lawful in Hanafi Jurisprudence (followed by 90% of Muslims in India and which Hanafi school alone recognizes Triple Talaq). Upholding the judgement in Shamim Ara case, the court observed that some special findings as to how Triple Talaq does not adhere to Quranic principles and therefore is bad in both theology and law in this case. (Shamim Ara vs State Of U.P. & Anr , 2002) The court held that Triple Talaq cannot be treated as essential religious practice merely because it has continued for long. Thus, the practice of Talaq -e- bidat or Triple Talaq is declared illegal and set aside.

POLITICISATION OF THE ISSUE

The nature of Indian State as stated in the preamble of Indian Constitution is ‘Secular’. However the notion of secularism in Indian context is different than that of western understanding. In India, secularism doesn’t imply treating religion as merely a private affair, but equal patronage of all religions. Keeping this spirit in view, Indian Muslims were granted the relative freedom, whereby they could formulate their own personal laws.

There have always been campaign in favour of Uniform Civil Code, and UCC indeed does look quite progressive. However the nature of campaign has been such, that politics remains at the core. Time and again political parties have tried to make an election gimmick out of this issue. There has been a lot of discourse on gender justice and the politics around it is not new. It is a known fact that every government has tried to contest the political battle in the name of representing women’s interest. The government has also tried to address the issue of Triple Talaq affecting Muslim Women and has overlooked the matters of education, unemployment and poverty which is the main concern facing Muslims. The issue of Triple divorce among Muslims has been in the public realm since the BJP led government came into power. The release of the report by Bhartiya Muslim Mahila Andolan (BMMA) regarding the issue of polygamy and triple divorce received instant media publicity and was projected as the pressing issue facing Muslim women. However, the incidence of Divorce according to 2011 census is very low only 0.49% Muslim women were divorcees and all were not given Triple Divorce. There have been some genuine cases where men acted irrational in giving Triple Divorce but a lot of prominence was given to such rare cases. They supported the issue out of the blue and submitted an affidavit to the court to abolish this practice as it impedes the gender equality which is unconstitutional. But it was ascertained as an attack on Muslim community by the All India Muslim Personal Law Board (AIMPLB) and alleged that personal laws cannot be re-written in the name of reforms. . It was seen as wider political agenda of the government to win the support of the Muslims in elections. The Prime Minister expressed his concern for the plight of the Muslim Women who are victims of instant Talaq time and again. During the election campaigning in Uttar Pradesh, he voiced his concern over the poor Muslim sisters and vowed to bring Justice to them. He referred their plight again while campaigning in Gujarat and declared that banning triple talaq is not a political question but a matter of bringing justice to Muslim women. (Agnes, 2018)

The proposed Triple Talaq bill (Protection of Rights on Marriage Bill, 2017) which seeks to make triple Talaq criminal offence punishable with three years in jail and fine has led to the various controversies. The criminalisation of triple divorce has serious repercussions in which law is dictating orthodox Hanafi Muslim women to continue in the relationship she considers “sinful”. Under this situation it undermines “individual choice and autonomy”. (Mustafa, Legal Excess :The triple talaq bill is a textbook case of overcriminalisation, 2017). The Supreme Court which has held the Triple Divorce Sinful, the bill has thus enforced religious morality through the instrumental of criminal law. The opposition parties also opposed the bill on various grounds. The Bill makes the offence non –bailable with three years in jail which would make it difficult for man to provide subsistence to the family. The bill also makes no opportunity for the martial couple to reconcile. The main aim with which the government had enunciated to abolish the Triple Talaq failed miserably. The bill doesn’t in any way ensure justice to the Muslim women rather makes their condition more wretched. The All India Muslim Personal Law Board (AIMPLB) also rejected the bill and alleged there are various flaws in the bill. They held that it makes the institution of divorce illegal and it bans the entire system of divorce. The bill doesn’t protect the rights of women. (Muslim personal law board says triple talaq bill will make divorce illegal, 2018) The bill has been passed in the Lok Sabha but pending in the Rajya Sabha. The question to provide gender justice to Muslim women still remains unanswered.

CONCLUSION

Going through substantial amount of archives, the issue of triple talaq does look quite deceptive. Backed by arguments from credible sources, it could be clearly maintained that this particular practice has a lot to with context, than the text. This paper has debunked the theories that certain groups, defending this barbaric law have been forwarding.

It has also established through constitutional provisions, and legal precepts, the need for an independent Board, where personal laws could be preserved and safeguarded in their original form, than to be used for narrow interests.

It has also tried to unearthing the politics that political parties have been playing in order to defend a certain vote base. This trend became visible, when Rajiv Gandhi led Congress succumbed to pressure of certain groups during Shah Banu case verdict, and during Narendra Modi led BJP government, the politics is being played other way around.

The need of the hour is to make sure constructive role is being played by all; those at the helm of affairs and those defending it in the court of law. The issue has to be solved through the broader consensus of community and legal luminaries.

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